7504

No. 11775

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

No. 11775

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants.

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

INDEX TO EXHIBITS

Plaintiffs' Exhibits:

Defendant's Exhibit:

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

GEORGE PENNEY

ROBERT M. NEWELL

939 Rowan Building
458 South Spring Street
Los Angeles 13, Calif.

For Appellee:

HINDMAN & DAVIS

607 South Hill Street
Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the Southern District of California
Central Division

No. 5868-B

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendant.

COMPLAINT FOR DAMAGES UNDER FIRE INSURANCE CONTRACT

Plaintiffs Complain and Allege:

I.

That at all times herein mentioned plaintiffs were partners doing business under the fictitious name of Skylark Cafe & Restaurant. That the plaintiffs were and are citizens of the State of California.

II.

That at all times herein mentioned defendant was and now is a corporation organized under and by virtue of the laws of the State of Washington, and was and now is a citizen of the State of Washington. [2]

III.

That the defendant was at all times herein mentioned engaged in the business of writing insurance under and

by virtue of the laws of the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is the sum of $20,388.95.

V.

That the jurisdiction of this court is based upon the diversity of the citizenship of the parties hereto and the amount in controversy, exclusive of interest and costs, being in excess of $3000.

VI.

That on or about the 10th day of July 1945, for a valuable consideration, defendant issued a fire insurance policy on the California standard form in which it insured furniture, fixtures and equipment usual to a restaurant, awnings and other personal property, as well as beers, wines, liquors, and property incidental to restaurant business of the plaintiffs located at 7519 Sunset Boulevard, Los Angeles, California, in the amount of $35,500.

VII.

That on or about the 12th day of January 1946, and while said insurance policy hereinabove mentioned was in full force and effect, a fire occurred on the premises occupied by the plaintiffs, resulting in loss and damage to the property of the plaintiffs in the amount of $26,880.23.

VIII.

That immediately thereafter plaintiffs gave written notice of said loss to defendant, and protected the property from further damage; separated the damaged and undamaged personal property and put it in the best possible order, and made a complete inventory, [3] stating the quantity and cost of each article and the amount claimed

thereon. That within 60 days after the commencement of the fire, the insured notified the defendant company, at its main office in California, by written statement, signed and sworn to, setting forth their knowledge and belief as to the origin of the fire, the interest of the insured and all others in the property, the cash value of the different articles or properties and the amount of loss thereon, all encumbrances thereon, all other insurance covering said articles, a copy of the description and schedules of all other policies, and all changes of title, use, occupancy, location, and possession of said property.

IX.

That following the receipt by defendant of the said sworn proof of loss hereinabove mentioned, defendant disagreed with the amount claimed therein and demanded of plaintiffs that they submit the question of the amount of loss and damage to an appraisal, and defendant named a competent and disinterested appraiser; whereupon and pursuant to said request for appraisal these plaintiffs named a competent and disinterested appraiser, and the two appraisers so selected nominated an umpire; and thereafter the two appraisers and the umpire did, on or about the 21st day of May 1946, agree in writing that the loss and damage to the property of the plaintiffs was the sum of $26,880.23.

X.

That there was in existence at the time of the issuing of said policy of defendant a policy of insurance issued by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, in the amount of $12,500, making a total insurance on the property of the plaintiffs in the amount of $48,000. That the insurance policy issued by the defendant company insured separately the food and liquor

of the plaintiffs, the loss to which under the appraisal agreement above mentioned was determined to be the sum of $1953.70. That the pro [4] rata share of the balance of $24,926.53, under the terms and conditions of the policy issued by the defendant, was 35.5/48 x $24,926.53, making the total liability of the defendant under its policy of insurance the sum of $20,388.95.

XI.

That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, but there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Matlin, which fact was known to the agents of the defendant at the time of the issuing of said policy. That said property insured by defendant at 7519 Sunset Boulevard was further subject to a lien in favor of Leo Kanner and Bertha Kanner, owners of the building at 7519 Sunset Boulevard, for the payment of rents due said owners from these plaintiffs, a fact which was known to the agents of defendant at the time of the writing of said contract of insurance.

XII.

That said mortgage issued to the said Walter J. McCormick and Edward A. Matlin, and said lien in favor of Leo Kanner and Bertha Kanner have heretofore been satisfied, and the plaintiffs are now entitled to all amounts due under said policy.

XIII.

That there is now due and owing from the defendant to the plaintiffs the sum of $20,388.95, and although

demand has been made upon the defendant for said sum, no part thereof has been paid.

XIV.

That plaintiffs are informed and believe and upon such information and belief allege that the defendant has refused payment of the amount due and owing to the plaintiffs under the policy [5] of insurance because of a provision in said policy, viz.:

> "This entire policy shall be void if the interest of the insured be other than unconditional and sole ownership."

XV.

That the defendant, with full knowledge of the fact that the interest of the plaintiffs was not that of sole and unconditional ownership, after the fire required plaintiffs to submit to an examination under oath, required plaintiffs to submit their loss to an appraisal, and has not at any time cancelled said policy or the remainder thereof and has retained the entire premium for said policy, and has waived that portion of the terms and conditions of said policy which require the interest of the insured to be unconditional and sole ownership.

Wherefore, plaintiffs pray judgment against defendant in the sum of $20,388.95, together with interest thereon at the rate of 7 per cent per annum from the 21st day of May 1946; for costs herein expended; and for such other and further relief as to the court may seem proper.

GEORGE PENNEY
Attorney for Plaintiffs [6]

[Verified.]

[Endorsed]: Filed Oct. 17, 1946. Edmund L. Smith, Clerk. [7]

[Title of District Court and Cause]

ANSWER

Comes now defendant and for Answer to Plaintiffs' Complaint:

I.

As to the allegations of Paragraph VI of plaintiffs' complaint, defendant admits it insured plaintiff Laura Gawecki, doing business as the Skylark Restaurant, against all loss of damage by fire, except as provided, to an amount not exceeding $35,500.00 from the 28th day of June, 1945, to the 28th day of June, 1948, by a written policy of insurance, insuring the property described as furniture, fixtures and equipment usual to a restaurant; and on beers, wines and liquors not to exceed 25% of the amount of insurance, all only while situate 7519 Sunset Boulevard, Los Angeles, California, and denies the [8] balance of the allegations of said Paragraph VI and each and every allegation, matter, and thing therein contained.

II.

As to the allegations of Paragraph VII of said complaint, defendant admits the same, except that defendant states that it is without knowledge and information sufficient to form a belief as to the truth of plaintiffs' averment that the loss and damage to the property of plaintiffs was in the amount of $26,880.23.

III.

As to the allegations of Paragraph X of plaintiffs' complaint, defendant admits that there was in existence at the time of the issuing of defendant's policy a policy

of insurance issued by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, in the amount of $12,500, making a total insurance on the property of plaintiffs in the amount of $48,000, and denies the balance of the allegations in said Paragraph X contained, and each and every other allegation, matter, and thing in said paragraph contained, and particularly denies that the liability of defendant under its policy was in the sum of $20,388.95, or in any other sum at all.

IV.

As to the allegations of Paragraph XI of plaintiffs' complaint, defendant admits said allegations, except that defendant denies that the facts alleged in said Paragraph XI were known to the agents of the defendant at the time of issuing of said policy or at the time of the writing of said contract of insurance, or at any other time prior to the loss by fire alleged in the complaint.

V.

As to the allegations of Paragraph XII of plaintiffs' complaint, defendant denies that the plaintiffs are now entitled to all or any amount due under said policy, and deny that all or any amount are or were at the time of the commencement of the foregoing-entitled action, or at all, due under said policy; and as to the balance of the [9] *of the* allegations of said Paragraph XII defendant states that it is without knowledge or information sufficient to form a belief as to the truth of said averments.

VI.

As to the allegations of Paragraph XIII of plaintiffs' complaint defendant denies that there is now or was at the time of the commencement of the foregoing-entitled action, or at any other time, or at all, due and owing from defendant to plaintiffs the sum of $20,388.95, or any other sum at all.

VII.

As to the allegations of Paragraph XIV of plaintiffs' complaint defendant admits that defendant has and does deny liability to plaintiff Laura Gawecki for, among other reasons, the breach of the conditions of the policy of insurance set forth in said Paragraph XIV.

VIII.

As to the allegations of Paragraph XV of plaintiffs' complaint defendant denies that it has retained the entire premium for said policy, and alleges that Laura Gawecki has never cancelled said policy or demanded or requested a return of any of the premium, and denies that defendant has waived that portion of the terms and conditions of said policy which require the interest of the assured to be unconditional and sole ownership, and denies that defendant has waived any of the terms or conditions of said policy.

Further Pleading and as a Further and Separate Defense to Plaintiffs' Complaint, Defendant Alleges:

I.

That in the policy of insurance referred to in plaintiffs' complaint, which policy is in the form provided by the

State of California, and known as the "California Standard Form Fire Insurance Policy," it was provided:

> "Unless otherwise provided by agreement endorsed hereon or added hereto this entire [10] policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, * * *"

but the policy pleaded in plaintiffs' complaint insured Laura Gawecki, doing business as Skylark Restaurant, against loss by fire, and at the time of the loss by fire alleged in plaintiffs' complaint to the property described in said policy of insurance the said Laura Gawecki was not the sole and unconditional owner of said property, but owned and held said property jointly with plaintiff Collette Mitre, and said condition of said policy was not waived by agreement endorsed upon said policy or added thereto, or in any other manner, or at all, and it was not provided otherwise than that the ownership of the insured in said policy of the property described therein should be other than unconditional and sole ownership.

Further Pleading, and as a Second, Further, and Separate Defense to Plaintiffs' Complaint, Defendant Alleges:

I.

That in the policy of insurance pleaded in plaintiffs' complaint, which policy was on the form known as California Standard Form Fire Insurance Policy, as provided for by the State of California, it was provided as follows:

> "Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company

shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage."

II.

That at the time of the loss or damage to the property described in said policy of insurance and in plaintiffs' complaint all of the property therein described was encumbered by chattel mortgages, one executed by plaintiffs herein to Walter J. McCormick and Edward A. Matlin, and another executed by former owners of the property to Leo [11] Kanner and Bertha Kanner.

Wherefore, defendant prays that plaintiffs take nothing by their complaint and that defendant go hence and have and recover its costs and disbursements herein.

E. EUGENE DAVIS
HINDMAN & DAVIS
By E. Eugene Davis
Attorneys for Defendant
607 South Hill Street
Los Angeles 14, California [12]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 19, 1946. Edmund L. Smith, Clerk. [13]

In the District Court of the United States
Southern District of California
Central Division

Honorable Leon R. Yankwich, Judge

No. 5869-Y

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Plaintiffs,

vs.

DUBUQUE FIRE & MARINE INSURANCE COMPANY OF DUBUQUE, IOWA, a corporation,

Defendant.

No. 5868-Y

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendant.

MEMORANDUM DECISION

The above-entitled causes, heretofore tried, argued and submitted, are now decided as follows:

It Is Ordered, Adjudged and Decreed that: [14]

(1) In Cause No. 5868-Y, the plaintiffs take nothing against the defendant General Insurance Company of America, a corporation, and that the said defendant do

have and recover from the plaintiffs its costs and disbursements therein.

(2) In Cause No. 5869-Y, the plaintiffs take nothing against the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, and that the said defendant do have and recover from the plaintiff its costs and disbursements therein.

I am of the view that the plaintiffs are not entitled to recover in either case. The defendants in their Answer pleaded the violation of a clause of the fire insurance policy relating to unconditional and sole ownership. For a while, and until the cause was fully argued, I believed that this was the only issue. Had this been so, the plaintiffs would have been entitled to recover, under those cases which hold that only a positive concealment of the facts as to ownership is a defense, and that where no inquiry is made as to ownership, the principle does not apply. (Dunn v. Phoenix Insurance Co., 1931, 113 C. A. 256; Ames v. Employer's Casualty Co., 1936, 16 C. A. (2) 254; Kahn v. Commercial Union Fire Insurance Co., 1936, 16 C. A. (2) 42.) However, the defendants have raised a more fundamental question, violation of the provision relating to chattel mortgages. This provision is made mandatory by the law of California (California Insurance Code, Secs. 2070-2071). As interpreted by the courts of California, the effect of this provision is to suspend fire insurance policy while the chattel mortgage is on the property. There was no disclosure of its existence or waiver of the condition by either company under the terms of the clause of each policy. This brings the case under [15] the rule declared in such cases as Hargett v. Gulf Insurance Company, 1936, 12 C. A. (2) 449 and cases therein cited, dating back to Steil v. Sun Insurance Company, 171 C.

795, decided in 1916, and which has been followed ever since. See also, Cinema Schools v. Westchester Fire Insurance Co., 1932, D. C. Cal., 1 Fed. Sup. 37, and Cinema Schools v. Federal Union Insurance Co., 1932, D. C. Cal., 1 Fed. Sup. 42, both decided by Judge John Knox of the Southern District of New York, while sitting in this district. (See also, Sun Insurance Office v. Scott, 1931, 284 U. S. 77.) There has been no waiver of this condition by any agent of either company authorized to make such waiver. (See the above cases and the opinion of our later colleague Ralph E. Jenney, in Alexander v. General Insurance Co., of America, 1938, D. C. Calif., 22 Fed. Sup. 157.)

So far as the General Insurance Company is concerned, this point was left without any doubt at the time of the trial. As to the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, there was some question as to whether the knowledge of the person, Mrs. O'Rourke, who secured the insurance, was transmitted to the Company through Mr. Myer Pransky. But, in view of the stipulation contained in the letter which has been filed since the trial, I am of the view that Mr. Pransky merely having authority to solicit insurance and not having authority to issue or countersign policies, could not bind the company by knowledge which he acquired as to the existence of the mortgage. And what is more, such mere knowledge without more was not effective as a waiver of the condition. For the policies distinctly provided for the only manner of waiving conditions in them. (See, Wilson v. Maryland Casualty Co., 1937, 19 Cal. App. (2) 463.) [16]

After the cause had been submitted, it was reopened at the request of the plaintiffs for the purpose of allowing

proof of compliance with Section 3440 of the Civil Code of California. This is the familiar section which requires a seven-day notice of intended sale or mortgage of stock in trade, fixtures, or equipment, and publication of such notice at least once during the seven-day period, to be completed not less than two days before the date of the sale or mortgage.

The object of this section is to protect the creditors against surreptitious sale or encumbrance of the stock in trade of a merchant, or the fixtures or equipment of a cafe owner on the basis of the ownership of which they may have extended credit. (See my opinion in re Mercury Engineering Company, 1946, D. C. Cal., 68 Fed. Sup. 376, 379.)

The chattel mortgage was dated July 7, 1945. It was recorded August 22, 1945. The notice of intention to mortgage was dated June 15, 1945, and was recorded at 3:21 o'clock P. M. of that day. Publication was made in the Independent-Review, a newspaper of general circulation, in its issue of June 15, 1945.

So we have full compliance with the requirement of Section 3440. But this cannot be of any assistance to the plaintiffs. The rights of the defendants, so far as the existence or non-existence of the mortgage is concerned, are not those of general creditors covered by this section. They are contractual. They stem from the contract of insurance. And the policies embodying such contract contain the following clause:

> "Chattel mortgage. Unless otherwise provided by agreement in writing endorsed [17] hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability

of the company upon other property hereby insured shall not be affected by such chattel mortgage."

So this clause says specifically that "unless otherwise provided by agreement in writing, endorsed hereon or added hereto," the insurance company shall not be liable, under the policy, for loss or damage of the property insured "while encumbered by chattel mortgage."

This suspension of liability is, therefore, effective unless the company through its authorized agent with actual knowledge of the existence of the chattel mortgage, has waived the condition. As already appears, there was no such waiver. And the notice under Section 3440 of the California Civil Code cannot take the place of the required actual waiver.

It is to be regretted that there is no method of compensating the plaintiffs for the undisputed loss they sustained through the fire. But, as the contracts were of their own making, and in the form made mandatory by the statutes of California, we cannot create liability where none exists.

Hence the rulings above made.

Dated this 6th day of August, 1947.

LEON R. YANKWICH
Judge [18]

Appearances:

For the Plaintiffs: George Penney, Esq.

For the Defendant General Life Insurance Company: E. Eugene Davis, Esq.

For the Defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa: Angus C. McBain, Esq.

[Endorsed]: Filed Aug. 6, 1947. Edmund L. Smith, Clerk. [19]

[Title of District Court and Cause]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the plaintiffs, by their attorney George Penney, and object to the Proposed Findings of Fact and Conclusions of Law heretofore submitted by the defendant's attorneys in the following particulars:

I.

Plaintiffs object to the findings in paragraph XI of said proposed findings of fact and request that the court specifically find that at no time were the plaintiffs delinquent in the payment of rents and that the chattel mortgage lien in favor of Walter J. McCormick and Isabel McCormick was never a chattel mortgage lien contemplated by the policy. The plaintiffs further request that the court specifically find that at the time of the issuing of the policy of insurance the soliciting agent L. O'Rourke [20] knew of the existence of both the chattel mortgage given to Edward A. Matlin as well as the chattel mortgage lien to Walter J. McCormick and Isabel McCormick for rent, but that said agent was a soliciting agent and not a general agent of said company; and that the court further find that the said chattel mortgages were recorded on the 22nd day of August 1945 in the office of the County Recorder of the County of Los Angeles and that the agents of the defendant company had constructive notice of the existence of the chattel mortgages at all times thereafter.

II.

Plaintiffs object to the findings set forth in paragraph XII of said proposed findings of fact and request that the

court specifically find that the chattel mortgage lien in favor of Walter J. McCormick and Isabel McCormick was not a chattel mortgage contemplated by the terms and conditions of said policy of insurance written by the defendant company, as there was no delinquency in the payment of rents at any time during the term of said insurance policy.

III.

Plaintiffs object to the findings set forth in paragraph XIII of said proposed findings of fact and request the court to specifically find that the plaintiffs had an insurable interest in said property and that no evidence was introduced to prove the extent of the respective interests of the two plaintiffs herein, as no issue was raised concerning said point during the course of said trial.

IV.

Plaintiffs object to the findings set forth in paragraph XIV of said proposed findings of fact, in the second paragraph thereof, and request the court to specifically find that at the time of the request for appraisal and examination under oath the defendant, through its adjusting representatives Dauerty & Dauerty, [21] had been apprised of the fact that there was a chattel mortgage in existence at the time of the fire in favor of Edward A. Matlin, said information having been conveyed to the adjusting representatives by the plaintiffs' sworn proof of loss; and, further, that the soliciting agent of the defendant company L. O'Rourke knew of the

existence of said chattel mortgage at all times before and after the issuing of said policy.

V.

Plaintiffs object to the findings set forth in the second paragraph of paragraph XVIII of said proposed findings of fact upon the grounds that L. O'Rourke, soliciting agent of the General Insurance Company, defendant herein, had notice and knowledge of the chattel mortgage issued to Edward A. Matlin and Walter J. McCormick and Isabel McCormick; further, that the plaintiffs did disclose to L. O'Rourke the existence of the chattel mortgage in favor of Edward A. Matlin and Walter J. McCormick and Isabel McCormick and that the plaintiffs at no time ever made any false representations concerning the extent of their ownership or the existence of any chattel mortgage.

Respectfully submitted,

GEORGE PENNEY

Attorney for Plaintiffs [22]

[Affidavit of Service by Mail.]

[Written]: Objections considered and overruled.

LRY, J.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Honorable Leon R. Yankwich, Judge of the above-entitled court; and plaintiffs appeared in person and by their attorney, George Penney, and defendant appeared by its attorneys, Hindman & Davis by E. Eugene Davis, and both plaintiffs and defendant having introduced evidence in support of their respective causes and defenses, and the matter having been duly submitted to the court for decision, and all and singular the law and the facts being by the court fully considered and understood, the Court doth now, on motion of defendant, make its Findings of Fact, as follows, to-wit:

FINDINGS OF FACT

I.

That at all times herein mentioned plaintiffs were partners doing business under the fictitious name of Skylark Cafe & Restaurant. That the plaintiffs were and are citizens of the State [24] of California.

II.

That at all times herein mentioned defendant was and now is a corporation organized under and by virtue of the laws of the State of Washington, and was and now is a citizen of the State of Washington.

III.

That the defendant was at all times herein mentioned engaged in the business of writing insurance under and by virtue of the laws of the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is the sum of $20,388.95.

V.

That the jurisdiction of this court is based upon the diversity of the citizenship of the parties hereto and the amount in controversy, exclusive of interest and costs, being in excess of $3000.00.

VI.

That defendant, by written contract of insurance, in form of California Standard Fire Insurance Policy, insured plaintiff Laura Gawecki, doing business as Skylark Restaurant, against all loss or damage by fire, except as provided, to an amount not exceeding $35,500.00 from the 28th day of June, 1945, to the 28th day of June, 1948, to the property described as furniture, fixtures and equipment usual to a restaurant, and on beers, wines and liquors not to exceed 25% of the amount of insurance, all only while situate 7519 Sunset Boulevard, Los Angeles, California.

VII.

That on or about the 12th day of January, 1946, a fire occurred to the premises described in said policy resulting in a loss [25] and damage to the property described in said contract of insurance in an amount of $26,880.23. That said policy was not in full force and effect at the time of said fire as more fully appears from the findings hereinafter made.

VIII.

That immediately thereafter plaintiffs gave written notice of said loss to defendant, and protected the property

from further damage; separated the damaged and undamaged personal property and put it in the best possible order, and made a complete inventory, stating the quantity and cost of each article and the amount claimed thereon. That within 60 days after the commencement of the fire, the insured notified the defendant company, at its main office in California, by written statement, signed and sworn to, setting forth their knowledge and belief as to the origin of the fire, the interest of the insured and all others in the property, the cash value of the different articles or properties and the amount of loss thereon, all encumbrances thereon, all other insurance covering said articles, a copy of the description and schedules of all other policies, and all changes of title, use, occupancy, location, and possession of said property.

IX.

That following the receipt by defendant of the said sworn proof of loss hereinabove mentioned, defendant disagreed with the amount claimed therein and demanded of plaintiffs that they submit the question of the amount of loss and damage to an appraisal, and defendant named a competent and disinterested appraiser; whereupon and pursuant to said request for appraisal these plaintiffs named a competent and disinterested appraiser, and the two appraisers so selected nominated an umpire; and thereafter the two appraisers and the umpire did, on or about the 21st day of May, 1946, agree in writing that the loss and damage to said property was in the sum of $26,880.23. [26]

X.

That there was in existence at the time of the issuing of said policy of defendant a policy of insurance issued

by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, in the amount of $12,500, making a total insurance on the property of the plaintiffs in the amount of $48,000. That the insurance policy issued by the defendant company insured separately the food and liquor of the plaintiffs, the loss to which under the appraisal agreement above mentioned was determined to be the sum of $1953.70.

That no finding of the prorata share of either of the said insurance companies is made, as it was stipulated that in event the court found against either or both of said insurance companies their respective proportions would be determined by agreement.

XI.

That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, and there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Matlin. That said property insured by defendant at 7519 Sunset Boulevard was further subject to a chattel mortgage lien in favor of Leo Kanner and Bertha Kanner, owners of the building at 7519 Sunset Boulevard, for the payment of rents due said owners from these plaintiffs. That neither at the time of the issuance and delivery of said policy of insurance nor at any other time, nor at all, prior to the investigation after the loss and damage by fire to said property was defendant, or any of its agents, apprised of or had any knowledge of the execution, delivery, or existence of said chattel mortgages, or of either of them.

XII.

That each and both of said chattel mortgages and the liens created thereby were in full force and effect at the time of said [27] fire, to-wit, on January 12, 1946, and were not paid, released, or discharged until long after said fire.

XIII.

That the foregoing-referred-to policy of insurance insured Laura Gawecki, doing business under the fictitious name of Skylark Cafe and Restaurant. That said property described in said policy of insurance was owned jointly by plaintiffs Laura Gawecki and Collette Mitre, and said policy insured only Laura Gawecki, doing business as Skylark Restaurant against loss by fire, and said Laura Gawecki was not the sole and unconditional owner of the property described in said policy inasmuch as the said Collette Mitre had an interest therein. That no evidence was introduced to prove the extent of the respective interests of the two plaintiffs herein.

XIV.

That after said fire defendant required plaintiffs to submit to an examination under oath as required by the terms of said policy, demanded an appraisal as provided for in said policy, and did not cancel said policy, and has not returned to plaintiffs, or either of them, any premium or unearned premium thereon.

The court further finds that at the time of the requirement for appraisal and examination under oath, the defendant or any of its agents, had no knowledge or information of the lack of sole and unconditional ownership of plaintiff Laura Gawecki in the property described in said policy, and had no knowledge or information of said chattel mortgages, or any of them.

The court further finds that neither of said plaintiffs has ever requested a cancellation of said policy from defendant or demanded a return of the premium thereon, or of any part thereof.

XV.

The court further finds that the policy of insurance referred to herein was in strict accordance with the form as required by the Insurance Code of the State of California, known as the California [28] Standard Form of Fire Insurance Policy, and, among other conditions, provided as follows, to-wit:

> "Unless otherwise provided by agreement endorsed hereon or added hereto this entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, * * *."

And said policy further provided as follows:

> "Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage."

XVI.

That said policy, among other things, further provided:

> "Non-waiver by appraisal or examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

XVII.

That there was no agreement in writing, or otherwise, endorsed upon said policy or added thereto, and no agreement, either oral or written, of any kind providing otherwise than in the said foregoing-quoted provisions of said policy.

XVIII.

The court further finds that at the time of the loss or damage to the property described in said policy of insurance and in [29] plaintiffs' complaint, all of the property therein described was encumbered by chattel mortgages, one executed by plaintiffs herein, as mortgagors, to Edward E. Matlin, as mortgagee, which chattel mortgage became in full force and effect on July 7, 1945, and was in full force and effect at all times thereafter until long after the fire of January 12, 1946; and said property was also, commencing on July 7, 1945 and in full force and effect at all times thereafter until long after the occurrence of the fire and loss and damage thereby to the property, further encumbered by a chattel mortgage executed and delivered by plaintiffs as mortgagors to Walter J. McCormick and Isabelle McCormick, as mortgagees, mortgaging an undivided one-third interest in and to all of said property.

And the court further finds that neither at the time of the execution and delivery of said policy nor at the time of said fire and loss and damage thereby on January 12, 1946, or at any other time, or at all, until after said fire and an investigation thereof, did defendant, or any of its agents, have any notice or knowledge of said chattel mortgages, or of either of them, or of the lack of sole and unconditional ownership of said property

in the insured Laura Gawecki, and that neither of said plaintiffs ever at any time prior to said investigation of said loss after said fire made any representations or disclosures to defendant, or any of its agents, concerning said chattel mortgages, or either of them, or of the nature and extent of the interest or ownership of plaintiffs or either of them in and to the property described in said policy of insurance.

Wherefore, applying the existing law to the foregoing Findings of Fact, the court makes the following

CONCLUSIONS OF LAW

I.

That plaintiffs are not entitled to judgment against defendant in any sum, and that defendant is entitled to judgment against plaintiffs, that it go hence without day, and have and [30] recover its costs and disbursements herein.

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH
District Judge

Approved as to Form under Rule 7.

Attorney for Plaintiffs

Disapproved as to Form.
GEORGE PENNEY
Attorney for Plaintiffs

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [31]

In the United States District Court for the
Southern District of California
Central Division
No. 5868-Y Civil

LAURA GAWECKI and COLLETTE MITRE, dba SKYLARK CAFE & RESTAURANT,

Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendant.

JUDGMENT

This cause having come on for trial before the Honorable Leon R. Yankwich, Judge of the above-entitled court, and plaintiffs having appeared in person and by their attorney, and defendant appearing by its attorneys, Hindman & Davis, by E. Eugene Davis, and the Court having heard evidence oral and documentary in support of the respective cause and defense, and the cause having been submitted, and the Court having heretofore rendered his decision and made Findings of Fact and Conclusions of Law herein, doth now, On Motion of defendant, Order, Adjudge and Decree that plaintiffs take nothing by their Complaint, and that defendant go hence and have and recover its costs and disbursements herein to be taxed by the Clerk at $.....

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH
District Judge

Approved as to Form under Rule No. 7.
GEORGE PENNEY
Attorney for Plaintiffs

Judgment entered Aug. 19, 1947. Docketed Aug. 19, 1947. C. O. Book 44, page 710. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [32]

[NOTICE OF ENTRY OF JUDGMENT]

Room 231, Federal Building
Los Angeles 12, California
August 19, 1947

George Penney, Esq.
939 Rowan Building
Los Angeles 13, Calif.
(plfs)

Hindman & Davis, Esqs.
607 So. Hill Street
Los Angeles 14, Calif.
(dft)

Re: Laura Gawecki et al. vs.
General Insurance Company etc.
No. 5868-Y Civil

Gentlemen:

This is to inform you that today, August 19, 1947, Judge Leon R. Yankwich signed and there was filed in above case, Findings of Fact and Conclusions of Law; Judgment; and Objections to Proposed Findings etc.

The Objections to Proposed Findings etc., have endorsed upon the face page "Objections considered and overruled. LRY/J."

The Judgment has been filed and entered in Civil Order Book 44 at page 710, as of August 19, 1947.

Very truly yours,

EDMUND L. SMITH

Clerk

By John A. Childress

Deputy [33]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL, MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DIRECT THE ENTRY OF A NEW JUDGMENT

Come now the plaintiffs, by their attorney George Penney, and file this their written motions as follows, to wit:

Their Motion for New Trial in the Above-Entitled Matter.

Said motion is based upon the following grounds, and each of them:

1. That errors of law appear upon the face of the record.

2. That it appears from the plearings and evidence in this case that an erroneous judgment has been rendered.

3. That it is manifest from the pleadings and evidence in this case that justice has not been attained by the judgment rendered therein.

4. That the findings of fact are not supported by the evidence. [34]

5. That the judgment is not supported by the evidence.

6. That the findings of fact are insufficient to support the conclusions of law.

7. That the findings of fact and conclusions of law are insufficient to support the judgment rendered therein.

8. That the conclusions of law are insufficient to support the judgment rendered therein.

Their Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment in the Above-Entitled Matter.

Said motion is based upon the following grounds, and each of them:

1. That it appears from the pleadings and the evidence in this case that the court should have found that the plaintiffs were entitled to judgment against the defendant.

2. That it appears from the pleadings and the evidence in this case that the plaintiffs were without fault and that the defendant is estopped from denying liability under the terms and conditions of the insurance policy issued by it to the plaintiffs.

3. That the judgment in the above-entitled matter should have been in favor of the plaintiffs and against the defendant.

Said motions and each and all of them will be based upon the files, records, documents, evidence, including reporter's transcript and exhibits received in evidence, and

memoranda of counsel heretofore filed in the above-entitled action.

Dated, this 25th day of August, 1947.

GEORGE PENNEY
Attorney for Plaintiffs [35]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 25, 1947. Edmund L. Smith, Clerk. [36]

[Minutes: Friday, August 29, 1947]

Present: The Honorable Leon R. Yankwich, District Judge.

Laura Gawecki, et al. vs. Gen'l Ins. Co. of America. No. 5868-Y Civil.

Laura Gawecki, et al. vs. Dubuque Fire & Marine Ins. Co. No. 5869-Y Civil.

(Same Order in Each Case):

For hearing motions of plaintiffs filed Aug. 25, 1947, (1) for new trial, (2) to amend Findings and Conclusions, and (3) for entry of new judgment; Geo. Penney, Esq., for plaintiffs; E. Eugene Davis, Esq., for defendant Gen. Ins. Co. in Case No. 5868; Angus C. McBain, Esq., for defendant Dubuque Fire & Marine Ins. Co., Case No. 5869;

Attorney Penney argues in support of motions.

Court makes a statement and denies all the said motions. [37]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Defendant Above Named, and to Its Attorneys Hindman & Davis:

Notice Is Hereby Given That Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, plaintiffs in the above-entitled action, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on the 19th day of August 1947, and from the order of the court in said action denying plaintiffs' motion for new trial, motion to amend the findings of fact and conclusions of law and direct the entry of a new judgment, and motion to correct findings.

Dated: October 7, 1947.

GEORGE PENNEY and
ROBERT M. NEWELL
By GEORGE PENNEY
Attorneys for Plaintiffs

[Endorsed]: Filed & mld. copy to Hindman & Davis, attys. for deft. Oct. 7, 1947. Edmund L. Smith, Clerk. [38]

In the District Court of the United States for the Southern District of California

Central Division

No. 5868-Y Civil

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendant.

STIPULATION FOR COSTS

Know All Men By These Presents, That we, Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, as Principals, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Maryland, as Surety, are held and firmly bound unto the General Insurance Company of America, a corporation, in the full and just sum of Two Hundred Fifty and No/100 Dollars ($250.00), lawful money of the United States, to be paid to the said General Insurance Company of America, a corporation, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The Condition of This Obligation Is Such, that

Whereas, the above named Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, Plaintiffs herein, have appealed, or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in favor of the Defendant in [39] the above entitled Court and in the above entitled action on or about the 19th day of August, 1947.

Now, Therefore, in consideration of the premises and of such appeal, if the said Plaintiffs, Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, shall prosecute their appeal to effect, and pay all costs that may be adjudged against them or either of them if the appeal is dismissed or the judgment is modified, then the above obligation to be void; otherwise to remain in full force and virtue, and in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten (10) days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 15th day of September, 1947.

SKYLARK CAFE & RESTAURANT

By Laura Gawecki

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By Robert Hecht—Attorney in Fact

Attest S. M. Smith—Agent

State of California—County of Los Angeles—ss:

On this 15th day of September, 1947, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in-Fact, and S. M. Smith, known to be to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

THERESA FITZGIBBONS

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires May 3, 1950.

Examined and recommended for approval as provided in Rule 8. Angus C. McBain, Attorney; George Penney.

Approved this 7 day of Oct., 1947. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Edw. F. Drew, Deputy.

The premium charged for this bond is $10.00 per annum.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith, Clerk. [40]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY IN THE APPEAL IN THIS CASE

I.

That the findings of fact do not support the conclusions of law or judgment in said case in that:

A. The plaintiffs sustained an actual loss which was intended to be covered under the insurance policy issued by the defendant.

II.

That the judgment is contrary to law in that:

A. The defendant by its actions has waived the terms and conditions of said insurance policy which provide that the interest of the insured be sole and unconditional; [41]

B. The defendant by its actions has waived the provision requiring a chattel mortgage endorsement on said policy while the property is en-encumbered by a chattel mortgage;

C. The defendant is estopped from setting up as a defense that the interest of the insured was other than sole and unconditional ownership;

D. The defendant is estopped from setting up as a defense that the insurance policy did not have an endorsement clause while said property was encumbered by a chattel mortgage;

E. Said judgment is contrary to the applicable laws of the State of California and of the United States of America.

III.

That the evidence is insufficient to sustain the findings of fact of the trial court.

IV.

That the trial court erred in denying plaintiffs' motion for a new trial.

V.

That the court erred in denying plaintiffs' motion to amend findings of fact and conclusions of law and direct the entry of a new judgment.

VI.

That the court erred in denying plaintiffs' motion to correct the findings.

Dated: October 7, 1947.

GEORGE PENNEY &
ROBERT M. NEWELL

By Geoerge Penney

Attorneys for Plaintiffs [42]

Received copy of the within Statement of Points this 7th day of October, 1947. Hindman & Davis, J. Hanson, Attorneys for Defendant.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith, Clerk. [43]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated by and between plaintiffs and defendants, through their respective attorneys George Penney and Robert M. Newell and Hindman & Davis, that the original exhibits in the above-entitled action may be sent to the Clerk of the Circuit Court of Appeals and that the court may enter an order directing the Clerk of the United States District Court to forward the original exhibits to the Clerk of the Circuit Court of Appeals.

Dated: October 21, 1947.

GEORGE PENNEY &
ROBERT M. NEWELL
By George Penney
Attorneys for Plaintiffs

HINDMAN & DAVIS
E. Eugene Davis
Attorneys for Defendant [47]

ORDER

In accordance with the foregoing stipulation, the Clerk is hereby ordered and directed to forward the original exhibits in the above-entitled action to the Clerk of the Circuit Court of Appeals in connection with the appeal in this action.

Oct. 22, '47.

PAUL J. McCORMICK
Judge

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith, Clerk. [48]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain full, true and correct copies of Complaint for Damages under Fire Insurance Contract; Answer; Memorandum Decision; Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Copy of Notice of Entry of Judgment; Motion for a New Trial; Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment; Minute Order Entered August 29, 1947; Notice of Appeal; Stipulation for Costs; Statement of Points Upon Which Appellants Intend to Rely in the Appeal in this Case; Designation of Record on Appeal and Stipulation and Order for Transmission of Original Exhibits which, together with copy of Reporter's Transcript of proceedings on June 17, 1947 and Original Plaintiff's Exhibits 1 to 11, inclusive, and Original Defendant's Exhibits A and B, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $12.10 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 31 day of October, A. D. 1947.

(Seal) EDMUND L. SMITH
Clerk

By Theodore Hocke
Chief Deputy Clerk

[Title of Disftrict Court and Causes]

No. 5868-Y Civil No. 5869-Y Civil

Honorabie Leon R. Yankwich, Presiding Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

June 17, 1947, Los Angeles, California

Appearances:

For the Plaintiffs: George Penney.

For Defendant General Insurance Co. Hindman & Davis, by Eugene Davis, 607 Consolidated Bldg., Los Angeles, Calif. VA-0701.

For Defendant Dubuque Fire & Marine Insurance Co.: Angus C. McBain, 639 So. Spring Street, Los Angeles, Calif. VA-1303.

Los Angeles, California, Tuesday, June 17, 1947,

10:00 A. M.

The Court: Cases No. 5868-Y Civil and No. 5869-Y Civil.

Mr. Penney: We are ready on behalf of the plaintiffs in both cases.

Mr. Davis: On behalf of the defendant General Insurance Company we are ready.

Mr. McBain: The defendant Dubuque Fire & Marine Insurance Company is ready.

The Court: These cases are consolidated for trial. I assume we can mark all the exhibits in one case, and take all the testimony in one case, and add such additional matters as may be peculiar to the other case.

Mr. Penney: That is satisfactory.

Mr. McBain: Yes.

Mr. Davis: Satisfactory.

The Court: Let us take the lowest number, 5868—the General Insurance Company case.

(Statements by counsel.)

LAURA GAWECKI,

called as a witness by and on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Laura Gawecki.

Mr. Penney: Mr. McBain, I note in your answer that you [2] have denied the existence of the fictitious name of the plaintiffs here as Skylark Cafe & Restaurant. It is admitted in the answer of the defendant General Insurance Company.

Mr. McBain: That is a matter of form. There is no issue.

Mr. Davis: We don't think it makes any difference.

Direct Examination

By Mr. Penney:

Q. Your name is Laura Gawecki?

A. Yes, sir.

Q. And you are the plaintiff in this action?

A. Yes.

Q. Collette Mitre is your daughter, is that right?

A. That's right.

Q. She is the only living child that you have?

A. Yes.

Q. I show you a policy issued by General Insurance Company of America, No. 2737 F-7909, in the amount of

(Testimony of Laura Gawecki)

$35,000, premium, $468.60, and ask you if you have ever seen that policy before. A. Yes.

Q. Is that the policy that was issued to you?

A. It is.

Q. And did you pay the premium on that policy?

A. I did.

Mr. Penney: I offer this policy in evidence, your Honor, [3] as Plaintiffs' Exhibit No. 1.

Mr. Davis: That is the General policy—the policy of General Insurance Company of America?

The Clerk: Plaintiffs' Exhibit 1 is in evidence.

(The document referred to was marked Plaintiffs' Exhibit 1 and was received in evidence.)

Q. By Mr. Penney: I will show you a policy issued by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, being policy No. 1362125, premium of $150.61, the policy being issued in the amount of $12,500, and I will ask you if you have ever seen that policy before. A. Yes.

Q. Did you pay the premium of $150.61?

A. I did.

Q. Has any portion of that premium ever been returned to you? A. No.

Mr. Penney: I will offer this policy in evidence as Plaintiff's Exhibit No. 2.

Mr. McBain: No objection.

The Court: It may be received.

The Clerk: Plaintiffs Exhibit No. 2 in evidence.

Q. By Mr. Penney: Mrs. Gawecki, from whom did you purchase the property known as Skylark Cafe.

A. From Maurice Villon and Edward Matlin. [4]

(Testimony of Laura Gawecki)

Q. And when did you make that purchase?

A. I believe it was about May 20, 1945.

Q. Was that purchase made through an escrow?

A. It was.

Q. Were there certain escrow instructions executed in regard to the purchase of that property?

A. There were.

Q. I will show you two instruments, one is marked Escrow Instructions, and the other Supplemental Escrow Agreement, and ask you if you recognize those instruments. A. Yes.

Q. Are those the escrow instructions and supplemental amendment to the escrow instructions under which you purchased the business known as Skylark Cafe, in May 1945? A. Yes.

Mr. Penney: I will offer these escrow instructions and supplemental escrow instructions in evidence.

Mr. Davis: To which we object as being incompetent, irrelevant and immaterial, unless they prove ownership.

Mr. Penney: They prove two things, Mr. Davis. The offer is made for this purpose: To show that the escrow instructions were subject to inspection by Mr. Pransky, and by the agent of General Insurance Company at the time of the purchase, and this referred to a chattel mortgage which was subsequently placed on record in this county. [5]

Mr. McBain: May it be understood that the Dubuque Fire & Marine Insurance Company joins in the objection Mr. Davis has stated?

Mr. Davis: We still object to this as being incompetent, irrelevant and immaterial. If it is for the purpose of showing knowledge of the defendants of the existence of the chattel mortgage, it would still be immaterial.

(Testimony of Laura Gawecki)

The Court: I think the only way I can pass on this is to allow them in, and determine their legal effect. This is a non-jury trial. I am not likely to be prejudiced by what I learn. I will allow them subject to the legal effect, when the facts are in.

Mr. Davis: I don't want to disturb the continuity. We make the objection, and we can make a motion to strike?

The Court: You may make a motion to strike, or ask me to disregard the matter.

Mr. McBain: Your Honor, in the interest of time, may we have a stipulation of counsel, and the approval of the court, that the objection stated by Mr. Davis may also be deemed on behalf of the defendant Dubuque Fire & Marine Insurance Company?

The Court: Yes, unless you sever yourself from him, the presumption will be you are joining in any objections made.

Mr. Penney: So stipulated.

The Court: They may be received as one exhibit. They are related to each other. [6]

The Clerk: Plaintiffs' Exhibit 3 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 3 and was received in evidence.)

Q. Mr. Penney: Do you know Mrs. O'Rourke?

A. I do.

Q. How long have you known her?

A. About 21 or 22 years.

Q. Did you ever disclose the contents of the escrow instructions to Miss O'Rourke? A. I did.

Mr. Davis: Same objection; incompetent, irrelevant and immaterial.

(Testimony of Laura Gawecki)

The Court: I will allow it subject to a motion to strike.

Q. By Mr. Penney: Do you know Mr. Pransky?

A. Yes, I do.

Q. Did you see him at any time at the bank, or at the place where the escrow was held? A. Yes.

Mr. McBain: May my objection be stated before the answer, as incompetent, irrelevant and immaterial?

The Court: All right. Overruled.

Q. By Mr. Penney: Where was this escrow?

A. At the L. E. Alimisis Realty Company, Sunset Boulevard. [7]

Q. Mrs. Gawecki, whose money was put into the escrow for the purchase of this property?

A. My money.

Mr. Davis: I object to that again. It is alleged and admitted that the two plaintiffs, Gawecki and Mitre, were partners operating this business. That is immaterial.

(Discussion.)

The Court: I will allow her to answer the question, but I don't think, in view of the statement of counsel, and in view of the fact that they admit it in paragraph 11, that it requires any testimony.

Q. By Mr. Penney: Mrs. Gawecki, this property is located at 7519 Sunset Boulevard, in Los Angeles, is that right? A. Yes.

Q. How long were you in possession of the property?

A. Well, from May to January 11th, when the fire occurred.

Q. January—

A. 1946.

(Testimony of Laura Gawecki)

Q. You suffered a fire at that time, did you?

A. I did.

Q. Did you subsequently make a sworn statement in proof of loss to both General Insurance Company, and the Dubuque Fire & Marine Insurance Company? [8]

A. I did.

Q. I show you an instrument, your sworn statement in proof of loss, just addressed to General Insurance Company, and ask you if that is your signature.

A. It is.

Mr. Penney: I offer the sworn statement of loss as Plaintiffs' Exhibit No. 4.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 4 and was received in evidence.)

Mr. Davis: That is the General?

The Clerk: That is right.

Q. By Mr. Penney: And a sworn statement in proof of the loss addressed to the Dubuque Fire & Marine Insurance Company, and ask you if that is your signature. A. It is.

Q. This sworn statement was subsequently sent to the Dubuque Fire & Marine Insurance Company through their adjusting representative? A. Yes.

Mr. Penney: I offer this as Plaintiff's Exhibit No. 5.

The Clerk: Plaintiffs' Exhibit 5 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 5 and was received in evidence.) [9]

(Testimony of Laura Gawecki)

Mr. Penney: You will stipulate, will you not, that Dauerty & Daurety were the adjusting representatives for both these defendant companies, in the adjustment of this loss?

Mr. Davis: Yes.

Mr. McBain: So stipulated.

Mr. Penney: Mr. Davis, I don't have the original request here by Dauerty & Dauerty for determinataion of appraisers in this matter.

Mr. Davis: I don't know, but I don't think there is any issue on it. May I make the statement that we will admit that within the time provided for in the policy that the plaintiffs, or plaintiff, singular, in the case of the General, presented proofs of loss in the form provided for in the policy; that within the 20 days, as provided for therein, defendants, and each of them, took exception to the amount of loss claimed by plaintiffs in their respective proofs of loss; that also, within the time provided for in the policy, the defendant demanded an appraisal of the amount of loss, according to the terms of the policy, and that an appraisal, under the terms of the policy, fixing a value on the amount of loss and damages, was duly had. I don't remember what the amount was. I would like to offer in evidence my reply to the demand for appraisal, and the reply of Dauerty & Dauerty to my letter.

Mr. McBain: May I ask Mr. Penney to accept the stipulation? [10]

Mr. Penney: Yes, I accept the stipulation.

Mr. McBain: The Dubuque Fire & Marine makes the same stipulation.

(Testimony of Laura Gawecki)

Mr. Penney: So accepted.

I will offer, your Honor, at this time, the reply of myself to the adjusting representatives of both the Dubuque & General Companies, and their communication to me in connection with the appraisal,—the two letters as plaintiffs' exhibits.

Mr. Davis: To which we object as being wholly incompetent, irrelevant and inmaterial, and I will state as one of our reasons, that the policy provides specifically that this is a California standard policy, and that this company shall not be held to have waived any conditions of this policy. I will read it:

> "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

That is the California standard statutory provision, and that has been sustained both by the California courts, and the Ninth Circuit.

The Court: If you claim a waiver, I will have to [11] sustain the objection. I will sustain the objection on the ground that there is not any modification of the stipulation in the written agreement. On the contrary, the condition in the written agreement is that no waiver is intended. The objection will be sustained.

Mr. Penney: I offer in evidence at this time, in view of the stipulation, the agreement for submission to appraisers and the award of the appraisal agreement as plaintiffs' exhibit.

(Testimony of Laura Gawecki)

The Clerk: No. 6.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 6 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 6 and was received in evidence.)

Q. By. Mr. Penney: Mrs. Gawecki, under the contract to purchase did you issue to Edward E. Matlin a chattel mortgage for the balance of the purchase price of the property? A. I did.

Mr. Penney: Counsel, you will stipulate that the chattel mortgage was recorded on or about the 22nd day of August, 1945?

Mr. Davis: Yes.

Mr. Penney: In the official records of the County of Los Angeles, State of California?

Mr. Davis: Yes. We have a certified copy of both of the mortgages here. [12]

The Court: You have admitted the execution in paragraph 11; you have admitted their existence, and the dates.

Q. By Mr. Penney: Following the fire did you pay off the chattel mortgage to Edward E. Matlin?

A. I did.

Q. I will show you a release of mortgage, and ask you if that is the instrument which he returned to you.

A. It is.

Mr. Penney: I will offer this as plaintiff's next in order.

Mr. Davis: I object to that as wholly immaterial. It is long after the fire, that the chattel mortgage was paid off by the plaintiff. Is that correct?

(Testimony of Laura Gawecki)

The Witness: Yes.

The Court: Objection overruled. It is to show the condition of the title.

The Clerk: Plaintiff's Exhibit 7 in evidence.

Q. By Mr. Penney: Mrs. Gawecki, I will show you a lease entered into between Walter J. McCormick and Isabelle McCormick, as landlords, and yourself and Collette Mitre, as tenants, and ask you if that lease was in escrow at the time that you purchased this property.

A. It was.

Q. Did you, in conformity with this lease, ever execute a separate chattel mortgage for security of the rent? [13]

A. I did.

Q. Was that chattel mortgage in escrow at the time that Mr. Pransky and Miss O'Rourke were there at the place of the escrow holders? A. It was.

Mr. Davis: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled. I will allow this to be gone into, and will determine the legal effect later on.

Q. By Mr. Penney: Have you subsequently, after the fire, paid all the rent due and owing to the landlord?

A. I have.

Q. You have vacated the premises? A. Yes.

Q. You have received nothing from either of these companies? A. Nothing.

Mr. Penney: You may cross examine.

Mr. Davis: There will be no cross examination.

(Short recess.)

Mr. Penney: Your Honor, I don't want to be persistent in this matter, but for the purpose of the record, there is nothing which shows I have made an offer of proof in regard to these two letters.

The Court: I thought they were marked for iden- [14] tification.

The Clerk: No.

The Court: They may be marked for identification.

Mr. Penney: Very well, and I will make the offer of proof, so they will become a part of the record.

The Clerk: Plaintiffs' Exhibit 8 for identification.

LORAINE O'ROURKE

a witness called by and on behalf of the plaintiffs, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Loraine O'Rourke.

Direct Examination.

By Mr. Penney:

Q. Is it Miss or Mrs. O'Rourke?

A. It has been Mrs., but I go under my maiden name. I always have.

Q. What is your occupation?

A. I haven't been active in business. I am not too active now. I have been dealing in real estate and insurance all my life.

Q. Were you dealing in insurance in the summer and spring of 1945? A. Yes, sir.

Q. Do you know Laura Gawecki, one of the plaintiffs in this case? A. Yes. [15]

Q. How long have you known her?

A. Well, I think I have known her about 25 years; 24 years; somewheres along there.

(Testimony of Loraine O'Rourke)

Q. Were you familiar with the details of a transaction in which she purchased the Skylark Cafe?

A. Yes, sir.

Q. Did you ever see any escrow instructions in connection with the purchase of the Skylark Cafe?

A. Yes, sir.

Q. Do you know Mr. Meyer Pransky?

A. Yes, sir.

Q. Did you ever see him at the escrow holder's?

A. Not in the escrow department, no, I didn't.

Q. Did you ever discuss with Meyer Pransky the escrow, or the matters pertaining to the purchase of the Skylark Cafe? A. Yes, sir.

Q. Were you ever appointed as an agent of the General Insurance Company of America, a defendant in this case? A. Yes, sir.

Q. Do you recall the date that you were made agent of the General Insurance Company?

A. Let me think. It is kind of hard to remember back. About June or July.

Q. Perhaps this instrument will refresh your recollec- [16] tion.

A. Yes, that's right, June, 1945.

Q. The 26th of June, 1945 you were appointed as agent of the General Insurance Company of America, is that right? A. Yes.

Mr. Penney: Counsel, will you stipulate that prior to the issuing of this policy that Meyer Pransky was the agent of the Dubuque Fire & Marine Insurance Company?

Mr. McBain: Yes, I will so stipulate.

(Testimony of Loraine O'Rourke)

Q. By Mr. Penney: Now, Miss O'Rourke, do you know the circumstances under which these policies, Exhibit No. 1, and Exhibit No. 2, Plaintiffs', were issued?

A. Yes, sir.

Mr. Davis: To which we object as being incompetent, irrelevant and immaterial, the action being on a written instrument, and all prior negotiations are merged in the written instrument.

The Court: I will overrule the objection, because of paragraph 11.

Mr. McBain: May I amend the objection, because it would call for the conclusion of this witness, and has no relationship to our company.

The Court: Overruled.

Q. By Mr. Penney: Do you know the circumstances under which the insurance was written?

A. Yes, sir, I understand the circumstances. Shall [17] I go from the beginning?

The Court: In a general way. I presume you knew of the sale?

Mr. Penney: Perhaps I can lead you along for the purpose of shortening time. Were there other insurance policies in existence at the time of the transfer of the property to the plaintiffs in this case?

A. Yes, there were.

Q. What, if anything, happened to those insurance policies?

A. I looked them all over, and had some of them cancelled, because there was too much insurance on the property. This Dubuque, and one similar to this, which they rewrote, I wanted to keep, because it was a good policy, and this one with the General. But there were

(Testimony of Loraine O'Rourke)

quite a few which it was not necessary to have, so we cancelled them.

Q. Did you know of the existence, at the time of the issuing of this policy, that there was a chattel mortgage in favor of the owners of the property for the unpaid purchase price? A. Yes, sir.

Mr. Davis: We object to this as incompetent, irrelevant and immaterial, and not within any of the issues of the case.

The Court: Overruled.

Mr. McBain: So far as the Dubuque Fire & Ma- [18] rine Insurance Company is concerned, it would be hearsay, and incompetent, irrelevant and immaterial, since the witness is not related to that company.

Mr. Davis: I would like to make the further statement that there is no showing that this person was the person who executed this contract on this policy. The contract was executed by the agent Thomas V. Humphreys. She would not be acting within the course of her employment.

The Court: Overruled.

Mr. Penney: You may answer, if you knew of the existence of the chattel mortgage executed by the plaintiff in this case to the prior owners.

A. Yes, I was very well aware of it.

Q. Did you know of the existence of the lease that was executed by the plaintiff in this case to the owners of the property? A. Yes.

Q. Were you familiar with the terms and conditions of it?

A. No, I was not, on the lease; I was not familiar at all.

(Testimony of Loraine O'Rourke)

Q. Did you have a discussion with Meyer Pransky with regard to issuing the Dubuque policy? A. Yes.

Q. Where did that conversation take place? [19]

A. In my home.

Q. Who else was present besides yourself and Meyer Pransky?

A. One of his men, working in his office. I can't remember the name of the gentleman.

Q. Can you tell me about the conversation?

A. Before dinner time—I don't know the date; I don't remember that far back; I know it was at the time Mrs. Gawecki was buying the Skylark, we had these policies. He came over to see me, because there were several which had not been paid for.

Q. What conversation did you have with him regarding the issuing of that policy?

Mr. McBain: The Dubuque Fire & Marine objects as incompetent, irrelevant and immaterial, and no showing of authorization on the part of Pransky.

The Court: I will sustain the objection. I will admit the conversation between this witness and Mr. Pransky.

Mr. Penney: I was trying to limit it with Pransky.

Mr. Davis: She said she did not talk with Pransky.

A. No, he was there, and one of his men; both were there. The other gentleman, I don't remember his name.

The Court: Pransky was present?

A. Yes.

The Court: I will overrule the objection. [20]

Q. By Mr. Penney: You may relate the conversation you had with regard to issuing the policy.

(Testimony of Loraine O'Rourke)

Mr. Davis: I would make the same objection, as incompetent, irrelevant and immaterial; no authority shown to make the statements, and the extent of authority, if any, not shown; and further, it is an attempt to vary and change the terms of a written instrument by previous conversations, which are merged in the instrument.

The Court: Overruled.

Q. By Mr. Penney: Relate what you said, and what Mr. Pransky said.

A. Mr. Pransky and I discussed other insurance, and this particularly, the Dubuque, keeping this one. There was another policy cancelled, which has no bearing on this case at all. It was a general conversation.

Q. Do you know whether these other policies were in escrow,—the ones that were cancelled?

A. Yes, they were.

Q. Were those the ones you discussed with Mr. Pransky?

A. Yes. I had them in my possession. Then I sent them back to him through the mail.

Mr. Penney: I will offer this Notice of Appointment in evidence, as Plaintiffs' Exhibit 9.

The Court: It may be received.

The Clerk: Plaintiffs' 9 in evidence. [21]

(The document referred to was marked Plaintiffs' Exhibit 9 and was received in evidence.)

Mr. Penney: Cross examine.

Cross Examination

By Mr. Davis:

Q. You spoke of other policies that were in escrow. Those were policies that were not insuring Mrs. Gawecki or Mrs. Mitre? A. Yes.

(Testimony of Loraine O'Rourke)

Q. They were insuring somebody else?

A. I think one of them was issued in her name, but the others were in the first owner's name, to be transferred in her name.

Q. Had they been transferred to her? Was there an insurance covering Mrs. Gawecki in escrow?

A. I can't remember exactly, because there were so many of them.

Q. Were there any policies you had handled as an agent of anybody, in escrow?

A. No, these were all policies—I remember them. There was one, a compensation policy, issued to her, which she kept. It does not have any bearing.

Q. Don't you decide what has bearing. I would like to get a straight story. When did you first enter into these negotiations, become a party to the negotiations, by which Mrs. [22] Gawecki and Mrs. Mitre bought this business?

A. During the time she was buying the Skylark.

Q. When was that? A. Sometime in May.

Q. May what? A. 1945.

Q. What part did you have to do with the negotiations for the purchase? Did you negotiate with the previous owners? A. No, I did not.

Q. She had already made her deal with them?

A. That's right.

Q. She consulted you about insurance only?

A. That's right.

Q. You then went to where the escrow was?

A. No, Mrs. Gawecki got the policies, and handed them to me.

Q. She got the policies the previous owner had?

A. She got them out of escrow.

(Testimony of Loraine O'Rourke)

Q. And brought them to you?

A. Yes, or I got them at her place of business.

Q. You decided to cancel all previous owners' policies except the Dubuque?

A. No, there were a couple of others.

Q. All I want to know is, you did write some insurance for Mrs. Gawecki? [23]

A. Yes, I did.

Q. What was the company?

A. The General Insurance Company.

Q. Compensation in the General?

A. No, just this particular fire.

Q. At the time you made negotiations you had not been appointed agent for the General then, had you?

A. I don't recall.

Q. Let me refresh your memory. You made the application for the insurance that later eventuated in the General policy through the Republic Insurance Company, is that correct? A. That is correct.

Q. You had no negotiations with the General at that time? A. No.

Q. You never talked yith anybody from the General?

A. No.

Q. You put your applicaation in the Republic?

A. That is correct.

Q. They informed you they had the risk bound?

A. They did not say anything.

Q. Just said it was bound? A. Yes.

Q. That was along about the 21st of June, was it not?

A. I don't remember. It was written in May, with other [24] insurance. In May we talked about it or discussed it.

(Testimony of Loraine O'Rourke)

Q. Let us assume that the policy was sometime in June. It was written in May, and you called the Republic Insurance Company?

A. I did not call them. I went into their office. It was sometime in June, I think.

Q. Who did you talk with at Republic?

A. Mr. Sharp.

Q. At that time he did not tell you what company he was going to place the insurance in, did he?

A. No, he did not.

Q. Then later you received, through Mr. Sharp the General policy? A. That is correct.

Q. You did not have any idea he was going to get a General policy? A. That is correct.

Q. As a matter of fact, you told me if you had known it was going to be General you would not have taken it?

A. That is correct.

Q. All of your relations with General were through Mr. Sharp of the Republic? A. Yes.

Q. It was after the insurance had been written that Mr. Sharp requested General to procure an agent's license for you? [25]

A. I don't know anything about that.

Q. You never requested General to procure an agent's license? A. No, not directly.

Q. The Republic requested General to give you an agent's license so they could pay you a commission on this policy?

A. That is hearsay. I don't know anything about it.

Q. You have never had any relationship with General?

A. Not direct. I used to, years ago.

(Testimony of Loraine O'Rourke)

Q. The only relationship you had with General, except years ago, was the receiving of this appointment of agent that you received after the 28th of June.

A. Yes.

Q. In order to enable you to get a commission on this policy?

A. I received from Sacramento a notice.

Q. You received a notice from Sacramento?

A. That is correct.

Q. The sole purpose of the agency appointment was to enable you to get a commission on the policy that had already been written through Mr. Humphreys' office, is that correct?

A. I don't know. I guess that was the general way they do business.

The Court: You know the Insurance Commissioner [26] would not allow you to receive a commission unless you were licensed as an agent, any more than you could get a commission for selling real estate unless you were licensed as a broker or salesman?

A. That's right.

Q. By Mr. Davis: All the negotiaations with reference to the General policy had been concluded before you got your agent's commission?

Mr. Penney: Do you mean before she received it?

Mr. Davis: Before you received it. It doesn't take effect until it is filed in the Commissioner's office.

A. That's right.

Q. I am going to call your attention to what we call a cover note, or a binder, and note that that bound the insurance from the 21st day of June.

A. I have never seen this before.

(Testimony of Loraine O'Rourke)

Q. Were you ever advised of this by Mr. Sharp?

A. What is it?

Q. That is temporary insurance from June 21 to July 21, until the policy could be written.

A. I don't know anything about this. I have never seen this before.

Q. You were merely advised by Mr. Sharp that he had procured coverage for Mrs. Gawecki?

Mr. Penney: I am going to object as being outside of the [27] issues in this case. That is something that occurred prior, and is merged in this insurance.

The Court: I think counsel is trying to show that the negotiations were not directly with the company, and there was a binder. I understand that is always the result, if it takes time to write the policy. She did not know of its existence, except she was told the insurance would be effective from that date?

The Witness: That is correct.

Q. By Mr. Davis: Later you received the policy through the mail?

A. I went in and picked it up.

Q. You went into Mr. Sharp's office and picked it up? A. Yes.

Q. Prior to this loss had you ever had negotiaations or discussions with Mr. Humphrey's the agent for the General Insurance Company? A. No.

Q. You did, a long time after the loss occurred, go into Mr. Humphreys' office and ask why the policy had not been paid? A. That's right.

Mr. Davis: That is all.

Mr. McBain: I have no questions, your Honor.

The Court: Any redirect?

Mr. Penney: No redirect. Your Honor, I shall offer in [28] evidence, with Exhibit No. 6, the breakdown of the award of the appraisers.

Mr. Davis: That is exactly the same amount?

Mr. Penney: Yes. That is the breakdown, showing how we arrived at the amount we sued on.

Mr. Davis: We have no objection.

Mr. McBain: We have no objection.

The Clerk: Shall it be stapled to this Exhibit 6, your Honor?

The Court: Yes.

Mr. Penney: We rest.

Mr. Davis: The General Insurance Company wishes to offer in evidence—

Mr. McBain: Make it on behalf of both companies.

Mr. Davis: You join with me in this offer?

Mr. McBain: Yes.

Mr. Davis: I offer the two chattel mortgages here referred to.

The Court: Haven't they been received?

Mr. Davis: Not the chattel mortgages. They have been admitted, but to clarify the record—

The Court: Let us take the real chattel mortgage for the balance of the purchase price. One is merely security for the rental.

Mr. Davis: They are both real chattel mortgages. [29] The one on the purchase price, we will take that first.

The Court: A

The Clerk: Defendants' Exhibit A in evidence.

(The document referred to was marked Defendants' Exhibit A and was received in evidence.)

Mr. Davis: That chattel mortgage was executed the 7th of July, 1945, and was recorded the 22nd of August; and the one I am handing the clerk now is also executed on the 7th of July, and recorded the 22nd of August.

One of these mortgages one-third interest in the property and the other a two-thirds' interest, both to secure—

Mr. Penney: They are only security for one note?

Mr. Davis: That's right. We will offer the other chattel mortgage, which is a chattel mortgage signed by Laura Gawecki and Collette Mitre, given to secure a promissory note for $13,500.00, mortgaging a one-third interest. The first is given to secure a promissory note for $13,500.00, mortgaging a two-thirds' interest.

Mr. Penney: I will stipulate to the execution of the chattel mortgages, but they are given only to secure the payment of one note.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Do you wish them both marked separately?

Mr. Davis: It may be better. [30]

The Clerk: The second one is Defendants' Exhibit B.

Mr. Davis: One mortgages a one-third interest, and the other a two-thirds' interest.

Mr. Penney: For the payment of the same note.

Mr. Davis: Will you stipulate that these mortgages mortgage property described in the policy, and in the proof of loss?

Mr. Penney: No question about it.

Mr. Davis: They mortgage all the property?

Mr. Penney: That's right, one, one-third, and the other, two-thirds, for the payment of one note of $13,500.00.

The Court: All right.

Mr. Davis: The defendant General rests, your Honor.

The Court: Have you any rebuttal?

Mr. Penney: No rebuttal, your Honor.

The Clerk: Did both defendants rest?

Mr. McBain: Yes, your Honor, the defendant Dubuque Fire & Marine Insurance Company will rest. [31] Los Angeles, California, Wednesday, July 30, 1947.

Mr. Penney: This is a motion I made in the form of a letter to the clerk.

The Court: I think there was a misunderstanding. It was not my desire to put this on for hearing the testimony at the present time, but merely to discuss whether such permission should be granted, because the letter did not disclose the nature of the testimony,—whether it would alter the factual situation. Who is appearing on the other side?

Mr. Penney: Mr. Davis and Mr. McBain.

The Court: Unless you gentlemen will stipulate to it.

Mr. Davis: I suggest that he put it in writing, and give it to us.

The Court: What is it you want to show, notice of intention to mortgage was given?

Mr. Penney: Yes.

The Court: I don't think the legal effect of that would change it, because that notice is merely for the protection of creditors. I don't think it would affect the existence or non-existence. Why don't you stipulate?

Mr. Davis: We told him we would probably stipulate.

The Court: I am ready to decide the case, gentlemen, but I will be very glad to have you state in the form

of a letter, or any addition to your memoranda, why you think that that [32] might change the situation.

Mr. Penney: I can make a very brief statement at this time.

The Court: You make your statement. I will have it put into the record, and see if Mr. Davis will stipulate. Then I will give you additional time if you desire, by way of letter. I don't want any additional information. You know this case was argued very fully. I will make this order: I will reopen the case solely for the purpose of allowing counsel to make a statement concerning any fact which may be stipulated to, but was not testified to by anybody at the time of the trial. You may proceed.

Mr. Penney: Your Honor, subject to the objection of the defendants in this case, I desire to offer in evidence at this time the publication of notice of intended mortgage under Section 3440 of the Civil Code, which was published in the Independent-Review June 15, 1945, together with a certified copy of the Notice of Intended Mortgage, which was recorded in the office of the County Recorder of this county on the 15th day of June, 1945, showing an intended mortgage on the part of these plaintiffs to Walter J. McCormick and Edward A. Matlin.

The Court: Who signed the notice?

Mr. Penney: The notice was signed by Laura Gawecki and Collette Mitre. [33]

The Court: That was mother and daughter?

Mr. Penney: That's right, the plaintiffs in this action.

Mr. Davis: We will admit it subject to our objection that it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection. But you do not raise any question as to its existence?

Mr. Davis: No.

The Court: To the effect that such notice was given, and publication, as required by Section 3440 of the Civil Code?

Mr. Davis: It is a matter of public record. We have a certified copy.

Mr. McBain: Subject to the same objection, so stipulated.

The Clerk: The plaintiffs' last exhibit was No. 9.

Mr. Penney: The publicaation will be 10.

The Court: The publication will be marked 10.

Mr. Penney: And the Notice of Intended Mortgage.

The Court: No. 11.

Mr. Penney: Your Honor, I have had the testimony of the plaintiff written up, and we have agreed that I may make a statement here regarding what her further testimony would be, subject to their objections that it is incompetent, irrelevant and immaterial.

The plaintiff, if called, would testify that she is now [34] 62 years of age; that her husband passed away some four or five years prior to the time of this transaction; that she had had no previous business experience of any kind, nor had she ever had any insurance policies written on any of her property; that she gave no information concerning the nature of her ownership, other than that contained in the escrow instructions at the time; that she did not read the policies after she received them, and at no time was her rent in arrears under the mortgage.

Mr. Davis: All we can do, subject to our objection as to incompetency and immateriality, is to agree on counsel's statement that she would so testify.

Mr. McBain: The remaining defendant would join in that, save for the statement as to the escrow instructions. We do not want to give rise to an inference that she handed the escrow instructions to any representative of the defendant insurance companies.

Mr. Davis: I don't take it that you mean it that way.

Mr. Penney: No.

Mr. Davis: In other words, she gave notice.

Mr. Penney: That she gave them no information concerning the nature of her ownership, except what information was contained in the escrow instructions.

Mr. Davis: Do you mean by that she gave them the escrow instructions? [35]

The Court: She was charged with knowledge of the escrow instructions, no matter how inexperienced she was.

Mr. Davis: I think we ought to clarify an ambiguous statement of Mr. Penney's. Do I understand what you want to say is that Mrs. Gawecki made no affirmative representations to us?

The Court: Made no representation; not affirmative. No representation as to her ownership, one way or another, and she was not asked anything about the ownership, isn't that right?

Mr. Penney: No, your Honor, we have positive testimony of Mrs. O'Rourke that she knew about this. I can put the plaintiff on the stand at some time convenient to the court, and ask her. Of course, I was merely trying to save time today, by giving a brief analysis of what she would testify to.

The Court: Can you agree to that?

Mr. Davis: I think so, if he clears up the ambiguity.

The Court: Restate it then.

Mr. Penney: She would testify that she is a widow, 62 years of age; that she had had no previous business

experience prior to this time; that she had had no experience at all in the supervision of the writing of any insurance policies; that at the time these policies were written that she made no representation to either of the two agents concerning her absolute ownership of the property, further than that [36] a chattel mortgage was given for the payment of the rent; that no rent was ever due under that mortgage.

Mr. Davis: It was never in arrears?

Mr. Penney: It was never in arrears under that mortgage. That when she received the policies she did not read the policies.

The Court: All right.

Mr. Davis: Yes, we will admit she would so testify.

Mr. McBain: So stipulated subject to our objection as to materiality.

Mr. Penney: There is one other thing. Mr. McBain and I have discussed the matter, and that is the agency that Pransky had at that time. We have not been able to determine that. We will advise the court by letter what that agency was, as soon as we obtain it.

Mr. McBain: That is correct. I will join with counsel in the letter subject, however, to its materiality.

The Court: How much time do you want?

Mr. Penney: I would say a week.

Mr. McBain: When Mr. Pransky returns, I think by Tuesday of next week, we can have that letter for your Honor.

The Court: Now, do you desire to make any comment in writing about the effect of this additional testimony which has been offered in regard to the notice?

Mr. Penney: I don't think it is necessary, unless the [37] court wishes it.

The Court: I leave it to you gentlemen.

Mr. McBain: I don't think it adds anything.

The Court: Then you desire a week in which to supply some fact in regard to the nature of the agency?

Mr. McBain: That is Mr. Penney's request. As soon as I am able to obtain the exact nature, I will join in a letter with him, and advise the court.

The Court: Counsel will be given until Wednesday the 6th of August, in which to supply, in the form of a letter, additional information in regard to the nature of the agency, the matter to stand submitted after the receipt of the letter.

Mr. Davis: That applies only to the defendant Dubuque.

The Court: The cases were tried together.

Mr. Davis: I am not interested in this information.

[Endorsed]: Filed Oct. 7, 1947, Edmund L. Smith, Clerk. [38]

[Endorsed]: No. 11775. United States Circuit Court of Appeals for the Ninth Circuit. Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, Appellants, vs. General Insurance Company of America, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 3, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11775

LAURA GAWECKI and COLLETTE MITRE, dba SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA,

Appellee.

No. 11776

LAURA GAWECKI and COLLETTE MITRE, dba SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE & MARINE INSURANCE COMPANY OF DUBUQUE, IOWA,

Appellee.

Upon Appeals From the District Court of the United States, for the Southern District of California, Central Division

APPLICATION FOR ORIGINAL EXHIBITS TO BE CONSIDERED IN ORIGINAL FORM WITHOUT PRINTING

Come now the appellants by their attorneys George Penney and Robert M. Newell and make formal application that the original exhibits in the above-entitled causes may be considered in their original form without printing.

Respectfully submitted,

GEORGE PENNEY and
ROBERT M. NEWELL
By George Penney
Attorneys for Appellants

So Ordered:
FRANCIS A. GARRECHT
Senior United States Circuit Judge

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes]

No. 11775 No. 11776

STATEMENT OF POINTS ON APPEAL

Come now the appellants, by their attorneys, and in lieu of filing a statement of points upon which they intend to appeal, adopt the statement of points filed with the Clerk of the trial court in the District Court of the United States, Southern District of California, Central Division.

Dated: October 27, 1947.

GEORGE PENNEY and
ROBERT M. NEWELL
By George Penney
Attorneys for Appellants

Received copy of the within Statement of Points on Appeal October ....., 1947. Hindman & Davis, by E. Eugene Davis, Attorneys for Appellee General Insurance Co.; Angus C. McBain, Attorney for Appellee Dubuque Fire & Marine Ins. Co.

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien, Clerk.